

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LYNN HOVER, et al.,

CASE NO. C16-1243JLR

Plaintiffs,

ORDER

V.

GMAC MORTGAGE
CORPORATION, et al.,

Defendants.

I. INTRODUCTION

Before the court is Defendants Nationstar Mortgage, LLC (“Nationstar”), Mortgage Electronic Registration Systems, Inc. (“MERS”), and Federal National Mortgage Association’s (“Fannie Mae”) (collectively “Moving Defendants”) second motion to dismiss (2d MTD (Dkt. # 20)) Plaintiffs Lynn Hover and Mila Hover’s (collectively, the “Hovers”) amended complaint (Am. Compl. (Dkt. # 17)). The Hovers oppose the motion. (2d MTD Resp. (Dkt. # 25).) The court has considered the motion,

1 the submissions filed in support thereof and opposition thereto, the relevant portions of
 2 the record, and the applicable law. Being fully advised,¹ the court STRIKES the Hovers'
 3 libel claim, GRANTS Moving Defendants' motion to dismiss, and DISMISSES with
 4 prejudice the Hovers' claims against Moving Defendants for private nuisance, unjust
 5 enrichment, and fraud. Further, the court ORDERS the Hovers to show cause why the
 6 court should not dismiss for failure to serve their claims against Defendants GMAC
 7 Mortgage LLC ("GMAC"), "Residential Mortgage Lender," Northwest Trustee Services,
 8 Inc. ("NWTS"), and John or Jane Does 1-1000 (collectively "Non-Moving Defendants").

9 II. BACKGROUND²

10 This case arises out of a planned non-judicial foreclosure of the Hovers' house.
 11 (See Am. Compl. ¶¶ 33-35.) On July 17, 2002, the Hovers signed a deed of trust for
 12 \$196,000.00 that was recorded against the Hovers' residence in Issaquah, Washington.

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14 ¹ No party has requested oral argument, and the court deems it unnecessary to the
 15 disposition of this motion. See Local Rules W.D. Wash. LCR 7(b)(4).

16 ² Moving Defendants ask the court to take judicial notice of five documents. (Req. (Dkt.
 17 # 8).) The court denies Moving Defendants' request that the court take judicial notice of the July
 17, 2002, promissory note (*id.* ¶ 1), the deed of trust (*id.* ¶ 2), and the notice of trustee's sale (*id.*
 18 ¶ 5). All three of those documents are attached to the Hovers' amended complaint (*see Am.*
 19 *Compl. Exs. A ("Deed of Tr."), B ("Prom. Note"), C ("Not. of Tr. Sale")*), and the court may
 20 therefore consider them for purposes of this motion without taking judicial notice thereof, *see*
 21 *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

22 Moving Defendants also ask the court to take judicial notice of the assignment of the
 23 deed of trust from MERS to Nationstar and the appointment of NWTS as the successor trustee,
 24 both of which have been recorded at the King County Recorder's Office. (Req. ¶¶ 3-4, Exs. 3
 25 ("Assign. of Deed"), 4 ("App't of NWTS").) The court can take judicial notice of public records
 26 that are not "subject to reasonable dispute." *Santa Monica Food Not Bombs v. City of Santa*
Monica, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006) (citing Fed. R. Evid. 201). The assignment and
 27 the appointment are not subject to reasonable dispute and the court accordingly takes judicial
 28 notice of those documents.

1 (Id. ¶¶ 1-4, 10; *see also* Deed of Tr. at 18.) On June 17, 2016, NWTS recorded a notice
2 of trustee's sale against the Hovers' residence. (Not. of Tr. Sale; Am. Compl. ¶ 33.) The
3 notice stated that the Hovers owed \$35,636.50 in order to keep the residence from
4 foreclosure and that the mortgage had a remaining principal balance of \$155,980.04.
5 (Not. of Tr. Sale at 3; Am. Compl. ¶ 34.)

6 In response to the notice of trustee's sale, on July 6, 2016, the Hovers filed a
7 complaint in King County Superior Court. (Compl. (Dkt. # 1-1).) In that complaint, the
8 Hovers alleged claims of private nuisance, unjust enrichment, and fraud. (Compl. ¶¶ 20,
9 30-34, 37-39, 49, 80-86.) The complaint also requested injunctive relief. (Id. ¶¶ 130-60.)
10 On August 8, 2016, Nationstar timely removed this action on the basis of diversity
11 jurisdiction. (See Not. of Rem. (Dkt. # 1).) In the notice of removal, Nationstar
12 contended that NWTS, a non-diverse party, was a nominal defendant to this suit and thus
13 did not destroy complete diversity. (Id. ¶ 13.)

14 On August 17, 2016, the court ordered Moving Defendants and Non-Moving
15 Defendants to show cause why the case should not be remanded for lack of subject matter
16 jurisdiction. (OSC (Dkt. # 10) at 1-2.) The order detailed the argument in the notice of
17 removal that NWTS did not destroy complete diversity because it was a nominal
18 defendant, but the court noted that the Hovers' complaint—although not a model of
19 clarity—could be construed to assert claims against NWTS. (Id. at 3-4.) The order
20 required Moving Defendants and Non-Moving Defendants to show cause and allowed,
21 but did not require, the Hovers to submit a responsive memorandum. (Id. at 5.)

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1 On August 29, 2016, Moving Defendants responded to the show cause order.
2 (OSC Resp. (Dkt. # 12).) Moving Defendants argued that because the original complaint
3 only named NWTS in its capacity as trustee, case law supported treating NWTS as a
4 nominal party. (*Id.* at 9.) Moving Defendants contended that only when the trustee is
5 alleged to have committed misconduct under the Deed of Trust Act, RCW ch. 61.24, such
6 as making a false statement on the notice of trustee's sale, does the trustee qualify as a
7 real party in interest in a foreclosure case. (*Id.* at 6 (citing *Beiermann v. JP Morgan*
8 *Chase Bank Nat'l Ass'n*, No. C11-5952RSL, 2012 WL 1377094, at *3 (W.D. Wash. Apr.
9 19, 2012); *Leem v. Bank of Am. Home Loans*, No. C13-1517RSL, 2014 WL 897378, at
10 *3 (W.D. Wash. Mar. 6, 2014)).) The Hovers did not respond to the order to show cause.
11 (See generally Dkt.) Based on Moving Defendants' brief, the legal authority cited
12 therein, and the Hovers' nonresponse, the court concluded that it had subject matter
13 jurisdiction because NWTS was a nominal defendant and therefore did not destroy
14 complete diversity.

15 On August 11, 2016, Moving Defendants moved to dismiss the original complaint
16 for failure to state a claim. (1st MTD (Dkt. # 7).) Moving Defendants contended that the
17 securitization of the deed of trust did not give rise to a cause of action. (*Id.* at 8-9.)
18 Additionally, Moving Defendants argued that the Hovers fail to state a claim because all
19 three claims were time barred by the applicable statutes of limitations. (*Id.* at 5-7.)
20 Finally, Moving Defendants argued that the Hovers failed to allege sufficient facts to
21 support each claim. (*Id.* at 11-13 (arguing private nuisance), 13-15 (arguing unjust
22 enrichment), 15-18 (arguing fraud).) The Hovers did not respond to the motion to

1 dismiss. (See generally Dkt.) On September 2, 2016, Moving Defendants filed a reply
2 memorandum in which they argued that the court should treat the Hovers' failure to
3 respond as an admission that Moving Defendants' motion has merit. (1st MTD Reply
4 (Dkt. # 13) at 3 (citing Local Rules W.D. Wash. LCR 7(b)(2))).

5 On September 8, 2016, the court dismissed the Hovers' claims against Moving
6 Defendants. (9/8/16 Order (Dkt. # 14).) In the order, the court explained that "each of
7 [Moving] Defendants' arguments has a firm legal basis." (*Id.* at 3.) Furthermore, the
8 court treated the Hovers' failure to respond as an admission that Moving Defendants'
9 motion had merit. (*Id.* at 2-3.) However, the court granted the Hovers leave to amend
10 their complaint to "remedy the deficiencies identified in Moving Defendants' motion to
11 dismiss." (*Id.* at 3.) The court cautioned the Hovers that "failure to timely amend the
12 complaint" would result in the court dismissing their claims against Moving Defendants
13 with prejudice. (*Id.* at 3-4.)

14 On October 18, 2016, the Hovers filed an amended complaint. (See Am. Compl.)
15 The amended complaint asserts a new cause of action, libel, stemming from the notice of
16 trustee's sale. (*Id.* ¶¶ 31-49.) The amended complaint also contains a lengthy discussion
17 of a party's right to a jury trial. (*Id.* ¶¶ 19-30, 52.) Besides the libel claim and the right
18 to a jury trial discussion, the Hovers' new complaint contains few allegations that were
19 not in the original complaint. (See *id.* ¶¶ 51 (asserting a private nuisance claim that is
20 partially premised on the libel claim), 62 (attempting to correct the elements for an unjust
21 enrichment claim), 64-65 (asserting legal conclusions), 82-83 (asserting legal
22 conclusions), 91-93 (discussing attached "industry publications"), 110 (asserting legal

1 conclusions and statements that all parties are aware or should be aware that “no real loan
2 exists”.)

3 On October 31, 2016, Moving Defendants filed a second motion to dismiss. (2d
4 MTD.) Moving Defendants argue that “very little distinguishes” the Hovers’ amended
5 complaint from their original complaint. (*Id.* at 2.) Moving Defendants address the
6 Hovers’ new libel claim (*id.* at 12-14) and reiterate their arguments from the first motion
7 as to the Hovers’ other claims (*id.* at 5-12, 14-24). Moving Defendants’ motion to
8 dismiss is now before the court.

9 III. ANALYSIS

10 The court first addresses the Hovers’ libel claim and then turns to the remainder of
11 the claims in their amended complaint.

12 A. Libel Claim

13 In its September 8, 2016, order, the court granted the Hovers leave to amend only
14 to “remedy the deficiencies identified in Moving Defendants’ motion to dismiss.”
15 (9/8/16 Order at 4.) The court did not grant leave to assert new claims. (*See id.*) The
16 Hovers’ libel claim, which they assert against Moving Defendants and Non-Moving
17 Defendants, appears for the first time in the amended complaint. (*See Am. Compl.*
18 ¶¶ 31-49.)

19 By adding a libel claim, the Hovers exceeded the scope of leave to amend that the
20 court granted. Further, the Hovers “did not otherwise seek leave of the Court to amend

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1 the pleadings to add new claims as required by Federal Rule of Civil Procedure 15(a).³

2 *DeLeon v. Wells Fargo Bank, N.A.*, No. 10-CV-01390-LHK, 2010 WL 4285006, at *3

3 (N.D. Cal. Oct. 22, 2010); *see also Au v. Republic State Mortg. Co.*, No. CIV. 11-00251

4 JMS, 2012 WL 3113147, at *15 (D. Haw. July 31, 2012). “[W]here leave to amend is

5 given to cure deficiencies in certain specified claims, courts have agreed that new claims

6 alleged for the first time in the amended pleading should be dismissed or stricken.”

7 *DeLeon*, 2010 WL 4285006, at *3 (collecting cases); *see also Wailua Assocs. v. Aetna*

8 *Cas. & Sur. Co.*, 183 F.R.D. 550, 557-58 (D. Haw. 1998) (striking a claim from an

9 amended pleading that disregarded court’s prior order); *Benton v. Baker Hughes*, No.

10 CV 12-07735 MMM MRWX, 2013 WL 3353636, at *3 (C.D. Cal. June 30, 2013), *aff’d*

11 *sub nom. Benton v. Hughes*, 623 F. App’x 888 (9th Cir. 2015) (“The addition of the

12 plaintiff’s new claims therefore exceeds the scope of the leave to amend granted, and it is

13 appropriate to strike the newly added claims on this basis.”). The court therefore strikes

14 the Hovers’ libel claim pursuant to Federal Rule of Civil Procedure 12(f).⁴

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16 ³ “Pro se pleadings are liberally construed. . . .” *Balistreri v. Pacifica Police Dep’t*, 901

17 F.2d 696, 699 (9th Cir. 1988). However “[p]ro se litigants must follow the same rules of

18 procedure that govern other litigants.” *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987),

19 *overruled on other grounds by Lacey v. Maricopa City*, 693 F.3d 896 (9th Cir. 2012).

20 ⁴ Until now, based in part on the Hovers’ non-objection, the court has treated NWTS as a

21 nominal party for purposes of analyzing subject matter jurisdiction. (See OSC; OSC Resp.; Dkt.)

22 Allowing the Hovers to proceed with a libel claim against NWTS would destroy complete

diversity and is therefore akin to joining a non-diverse party after removal. *See* 28 U.S.C.

§ 1447(e) (“If after removal the plaintiff seeks to join additional defendants whose joinder would

destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the

action to the State court.”); *see also Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691 (9th Cir.

1998) (construing 28 U.S.C. § 1447(e) as “couched in permissive terms,” which “gives the

district court the discretion to deny joinder”). In such a situation, the court determines whether

to permit joinder by considering the following factors: 1) whether the would-be-defendant is

1 **B. Original Claims**

2 In their amended complaint, the Hovers slightly alter their original claims for
 3 private nuisance, unjust enrichment, and fraud. (*Compare* Compl. with Am. Compl.; *see*,
 4 *e.g.*, Am. Compl. ¶ 51); *see also supra* § II. The court now turns to Moving Defendants'
 5 second motion to dismiss those claims.

6 1. Legal Standard

7 When considering a motion to dismiss under Federal Rule of Civil Procedure
 8 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving
 9 party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir.
 10 2005). The court must accept all well-pleaded allegations of material fact as true and
 11 draw all reasonable inferences in favor of the plaintiff. *See Wyler Summit P'ship v.*
 12 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). “To survive a motion to
 13 dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a
 14 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
 15 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Telesaurus*
 16 *VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). “A claim has facial plausibility
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 19 necessary for just adjudication of the controversy; 2) whether the plaintiff still could bring an
 20 action in state court against the putative defendant; 3) whether there has been any unexplained
 21 delay in joinder; 4) whether it appears the plaintiff is seeking to destroy jurisdiction; 5) the
 22 apparent merit of the claims against the new party; and 6) whether the plaintiff would suffer
 23 prejudice without the joinder of the defendant. *Palestini v. Gen. Dynamics Corp.*, 193 F.R.D.
 24 654, 658 (S.D. Cal. 2000); *see also Perryman v. Life Time Fitness*, No. 09-CV-0452-PHX-GMS,
 25 2009 WL 764547, at *1-2 (D. Ariz. Mar. 24, 2009). Here, all six factors are either neutral or
 26 favor denying the effective joinder of NWTS. This rationale therefore also supports dismissing
 27 the Hovers’ newly asserted libel claim against NWTS.

1 when the plaintiff pleads factual content that allows the court to draw the reasonable
 2 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

3 The court, however, need not accept as true a legal conclusion presented as a
 4 factual allegation. *Id.* Although Federal Rule of Civil Procedure 8 does not require
 5 “detailed factual allegations,” it demands more than “an unadorned, the-defendant-
 6 unlawfully-harmed-me accusation.” *Id.* (citing *Twombly*, 550 U.S. at 555). A pleading
 7 that offers only “labels and conclusions or a formulaic recitation of the elements of a
 8 cause of action” will not survive a motion to dismiss under Federal Rule of Civil
 9 Procedure 12(b)(6). *Id.* A complaint does not survive dismissal where “it tenders ‘naked
 10 assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at
 11 557). In addition, “[a] plaintiff suing multiple defendants ‘must allege the basis of his
 12 claim against each defendant to satisfy Federal Rule of Civil Procedure 8(a)(2), which
 13 requires a short and plain statement of the claim to put defendants on sufficient notice of
 14 the allegations against them.’” *Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1103
 15 (E.D. Cal. 2014) (quoting *Gauvin v. Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal.
 16 1988)). In deciding a motion to dismiss, the court may consider the pleadings,
 17 documents attached to the pleadings, documents that are judicially noticed, and
 18 documents that the pleadings incorporate by reference. *Ritchie*, 342 F.3d at 908 (citing
 19 *Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir. 2002)).

20 2. Failure to State a Claim

21 Each of the Hovers’ claims is premised on the invalidity of the deed of trust. (See
 22 Am. Compl. ¶¶ 55 (alleging that there was no deed of trust or contract in support of the

1 private nuisance claim), 62 (same in support of the unjust enrichment claim), 130 (same
 2 in support of the fraud claim).) Most of the Hovers' allegations of invalidity are
 3 recitations of legal authority or conclusory assertions, which the court does not treat as
 4 true for purposes of ruling on Moving Defendants' motion. (*See, e.g., id.* ¶ 55 ("The
 5 Defendant(s) has not executed a legitimate contract with Plaintiff(s) to act on, nor has
 6 been transferred a bona fide contract.").) As best the court can infer from the
 7 non-conclusory factual allegations, the Hovers base the deed's invalidity on the flawed
 8 legal theory that the securitization of the Hovers' mortgage vitiates their obligations as
 9 borrowers or the terms of the loan between the Hovers and the lenders. (*See, e.g., Am.*
 10 *Compl.* ¶¶ 58, 62; *see also* 2d MTD at 8-9; 2d MTD Resp. ¶ b, Ex. 1 at 12 (agreeing that
 11 securitization is a "factor" of the unjust enrichment and fraud causes of action).)

12 Washington law does not provide borrowers relief from their mortgages because
 13 the deed of trust was assigned or securitized. *See Velasco v. Discover Mortg. Co.*, 2015
 14 WL 1753677, at *11 (Wash. Ct. App. 2015) (unpublished)⁵ ("Washington law does not
 15 provide that transfer of the note into a mortgage backed securities pool discharges the
 16 [plaintiff's] debt obligation on the note"). Federal courts applying Washington law agree
 17 that securitization or transfer of beneficiaries do not invalidate a deed of trust. *See Young*
 18 *v. Quality Loan Serv. Corp.*, No. C14-1713RSL, 2015 WL 12559901, at *1 (W.D. Wash.
 19 July 7, 2015); *St. Louis v. JPMorgan Chase Bank N.A.*, No. C12-0614MJP, 2012 WL

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21 ⁵ "[W]e may consider unpublished state decisions, even though such opinions have no
 22 precedential value." *Emp'r's Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n.8
 (9th Cir. 2003).

1 12846992, at *3 (W.D. Wash. June 11, 2012) (holding securitization did not nullify the
2 deed of trust or promissory note); *Andrews v. Countrywide Bank, NA*, 95 F. Supp. 3d
3 1298, 1301 (W.D. Wash. 2015).

4 Stripped of the conclusory allegations and the allegations that rely on this flawed
5 securitization theory, the Hovers' complaint fails to state a claim against Moving
6 Defendants. The Hovers do not dispute that they received \$196,000.00 in return for the
7 obligation to repay that money with interest over a period of time. (See Deed of Tr. at 2;
8 Prom. Note at 21.) Nationstar is the current beneficiary of the deed of trust and can
9 initiate a non-judicial foreclosure if the Hovers have not made current loan payments.
10 (Req. for Jud. Not. at 2, Ex. 3.) The court cannot plausibly infer from the amended
11 complaint any unreasonable interference on the part of Moving Defendants as they move
12 toward that foreclosure sale. *See Lakey v. Puget Sound Energy, Inc.*, 296 P.3d 860,
13 867-68 (Wash. 2013) (explaining that a defendant's unreasonable interference is a
14 necessary element of private nuisance). There is also no basis to infer inequity, a
15 necessary element of the Hovers' unjust enrichment claim. *Dragt v. Dragt/DeTray, LLC*,
16 161 P.3d 473, 482 (Wash. Ct. App. 2007) (quoting Restatement (Third) of Restitution
17 and Unjust Enrichment § 1 (2011)). Finally, the Hovers also fail to meet the heightened
18 pleading standard for fraud, *see* Fed. R. Civ. P. 9(b), because the allegedly concealed
19 truth—that the loan would be securitized or transferred (*see* Am. Compl. ¶ 110)—was not
20 concealed (*see* Deed of Tr. ¶ 20) and there is no suggestion that its concealment caused
21 damage to the Hovers, *see Adams v. King Cty.*, 192 P.3d 891, 902 (Wash. 2008)
22 (articulating the elements of fraud, including causation).

1 The Hovers have again failed to state claims for fraud, private nuisance, and unjust
 2 enrichment.⁶ (See 9/8/16 Order.) The court therefore dismisses those claims⁷ against
 3 Moving Defendants.

4 **C. Leave to Amend**

5 Having concluded that the Hovers fail to state a claim against Moving Defendants,
 6 the court considers whether to grant leave to amend. Moving Defendants request that the
 7 court deny leave to amend due to futility. (2d MTD at 22-23.) Federal Rule of Civil
 8 Procedure 15 states that “the court should freely give leave [to amend pleadings] when
 9 justice so requires.” Fed. R. Civ. P. 15(a)(2). To determine whether justice requires
 10 leave to amend, the court considers: (1) the presence or absence of undue delay, (2) bad

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 12 ⁶ The Hovers’ claims, as pleaded, are also again subject to dismissal on statute of
 13 limitations grounds. (See 2d MTD at 6-7; *see also* 1st MTD at 5-6 (raising the same argument).)
 14 “A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable
 15 statute of limitations only when ‘the running of the statute is apparent on the face of the
 16 complaint.’” *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 969 (9th Cir. 2009). All
 17 the claims are based on alleged improprieties that occurred when the parties signed the contract
 18 in 2002. (See *supra* § III.B.2.) The statute of limitations for fraud is three years, RCW 4.16.080,
 19 the statute of limitations for contractual claims is six years, RCW 4.16.040, and there is no
 20 suggestion that the Hovers recently learned of the facts underlying this lawsuit. Thus, the face of
 21 the complaint makes apparent that the fraud claim expired in approximately 2005 and the private
 22 nuisance and unjust enrichment claims, which rely on the unenforceability of the deed of trust
 and promissory note, expired in approximately 2008.

23 The Hovers resist this conclusion by suggesting that equitable tolling might save the
 24 claims. (2d MTD Resp. ¶ 2, Ex. A at 12.) There are no allegations, however, that give rise to the
 25 plausible inference that the statute of limitations would be tolled for more than half a decade.
 26 (*See generally* Am. Compl.)

27 ⁷ The Hovers also seek injunctive relief (*see* Am. Compl. ¶ 158) and assert their right to a
 28 jury trial (*see, e.g.*, *id.* ¶¶ 19-30; 2d MTD Resp. at 4-9). Injunctive relief is a remedy, not a cause
 29 of action. *See Chan v. Chase Home Loans, Inc.*, No. C12-0273JLR, 2012 WL 1252649, at *3
 30 (W.D. Wash. Apr. 13, 2012) (collecting cases). Dismissal for failure to state a claim does not
 31 impinge on the Hovers’ right to a jury trial. *See, e.g., Fischer v. United States*,
 32 No. EDCV02-691-OMP(SGL), 2003 WL 21262103, at *5 (C.D. Cal. May 30, 2003) (collecting
 33 cases).

1 faith, (3) dilatory motive, (4) “repeated failure to cure deficiencies” in previous
 2 amendments, and (5) futility of the amendment. *Moore v. Kayport Package Exp., Inc.*,
 3 885 F.2d 531, 538 (9th Cir. 1989) (citing *Foman v. Davis*, 371 U.S. 178, 181, 83 (1962)).
 4 “Unless it is absolutely clear that no amendment can cure the defect, . . . a pro se litigant
 5 is entitled to notice of the complaint’s deficiencies and an opportunity to amend prior to
 6 dismissal of the action.” *Garity v. APWU Nat’l Labor Org.*, 828 F.3d 848, 854 (9th Cir.
 7 2016) (quoting *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995)).

8 Here, the court already gave the Hovers notice of their complaint’s deficiencies
 9 and an opportunity to amend the complaint. (See 9/8/16 Order.) The Hovers added
 10 assertions of the right to a jury trial (Am. Compl. ¶¶ 19-30, 52), a new libel claim (*id.*
 11 ¶¶ 31-49), and conclusory refutations of Moving Defendants’ arguments (*see, e.g., id.*
 12 ¶ 65 (“We, hereby rebut any presumption [we] have waived [our] rights to do this with
 13 regards to this transaction.”)). The Hovers’ amended complaint is nonresponsive to the
 14 pleading deficiencies that the court identified in dismissing their first complaint. It is
 15 therefore clear that further leave to amend would be futile, and the court denies the
 16 Hovers leave to amend their claims against Moving Defendants.

17 **D. Service of Process on the Remaining Defendants**

18 The Hovers now retain private nuisance, unjust enrichment, and fraud claims only
 19 against Non-Moving Defendants. (Compare Am. Compl. (asserting claims against
 20 Moving Defendants and Non-Moving Defendants for libel, private nuisance, unjust
 21 enrichment, and fraud), with *supra* §§ III.A. (striking the fraud claim), III.B.2.
 22 (dismissing the private nuisance, unjust enrichment, and fraud claims against Moving

1 Defendants). The Hovers appear to have failed to serve Non-Moving Defendants. (See
2 generally Dkt.) Federal Rule of Civil Procedure 4 requires a plaintiff to serve each
3 defendant with a summons and a copy of the complaint and sets forth the specific
4 requirements for doing so. Rule 4(m), which provides the timeframe in which service
5 must be effectuated, states in relevant part:

6 If a defendant is not served within 90 days after the complaint is filed, the
7 court—on motion or on its own after notice to the plaintiff—must dismiss
8 the action without prejudice against that defendant or order that service be
made within a specified time. But if the plaintiff shows good cause for the
failure, the court must extend the time for service for an appropriate period.

9 Fed. R. Civ. P. 4(m); *see also* Fed. R. Civ. P. 4(l)(1) (stating the requirement that the
10 plaintiff prove service).

11 There is no evidence in the record that the Hovers properly and timely served
12 NWTS, Residential Mortgage Lender,⁸ GMAC,⁹ or John or Jane Does 1-1000¹⁰ with the
13 summons and complaint. (See generally Dkt.) Therefore, the court orders the Hovers to
14 show cause within 14 days why their claims against Non-Moving Defendants should not
15 be dismissed for failure to serve. If the Hovers fail to timely show good cause for their
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18 ⁸ Moving Defendants assert that this party does not exist and that the Hovers erroneously
named this party based on the definition section of the deed of trust. (Not. ¶ 5; 1st MTD at 2-3;
2d MTD at 3.)

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20 ⁹ Attorney Rebecca Shrader, lead counsel for Moving Defendants, listed herself as
counsel of record for GMAC but asserts her notice of appearance was a clerical error and moved
to withdraw. (Withdrawal Mot. (Dkt. # 9) at 1.) Although the court denied as moot her motion
to withdraw (9/8/16 Order at 4), there is no indication that GMAC has been served.

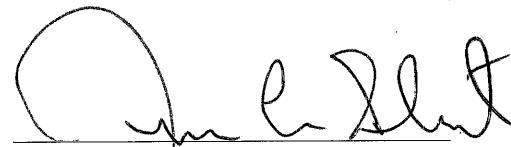
21
22 ¹⁰ John or Jane Does 1-1000 appear to be nominal defendants that the Hovers have not
identified. (See Am. Compl. at 2.)

1 failure to serve Non-Moving Defendants, the court will dismiss the claims against Non-
2 Moving Defendants without prejudice and without leave to amend.

3 **IV. CONCLUSION**

4 Based on the foregoing analysis, the court STRIKES the Hovers' libel claim,
5 GRANTS Moving Defendants' motion to dismiss (Dkt. # 20), and DISMISSES with
6 prejudice the Hovers' claims against Moving Defendants for private nuisance, unjust
7 enrichment, and fraud. The court further ORDERS the Hovers to SHOW CAUSE within
8 fourteen (14) days of the date of this order why their claims against Non-Moving
9 Defendants should not be dismissed without prejudice for failure to serve.

10 Dated this 21st day of March, 2017.

11 
12 JAMES L. ROBART
13 United States District Judge
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